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ABSTRACT

The United States Supreme Court's attitude toward school integration is analyzed in this paper. The liberal rulings of the Court under Justice Earl Warren are traced through 1974. The Court's consideration during this racist period and the disproportionate impact of school board policies in producing segregated schooling is detailed. The reversal of these policies by the Court under Justice Warren Burger is discussed. It is asserted that the Burger Court has effectively limited court ordered school integration to the neighborhood concept. In addition, it is pointed out that the Burger Court is making it more difficult to bring suit in Federal court and to obtain legal council in cases relating to segregated schools. Strategies are suggested to counter the present negative attitudes of the Burger Court toward school integration. (Author/GC)

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The Burger Court and School Integration, 1978: The End of the Second Reconstruction Period, 1954-1974

by

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Several years ago when I started watching the U.S. Supreme Court on school integration issues for trends on a liberal-conservative continuum, I concluded that the jury was still out.[1] And, indeed, a survey of relevant material on the Court drew similar conclusions.[2] However, the verdict is in and discussions on the topic by law review articles,[3] books,[4] newspapers,[5] magazines[6] all rate the current Supreme Court as very conservative to radically conservative on school integration. Regarding the individual Justices of the Supreme Court, Robert C. Maynard placed them in three categories; Associate Justices William J. Brennan, Jr. and Thurgood Marshall are classified as liberals; Associate Justices Lewis F. Powell, Jr. and John Paul Stevens, Peter Stewart, and Byron R. White as moderates; and Associate Justices Harry A. Blackmon and William H. Rehquist along with Chief Justice Warren E. Burger as

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1. Brown, Frank, "The Equal Protection Clause, School Integration, and the Burger Court," paper presented at Annual Conference of NOLPE, November, 1976, Atlanta.

2. Case, Harold W., et al., The Constitution and What It Means Today, 13th edition, Princeton University Press, 1975, p. 245; Lamorte, Michael, "The Burger Court: Its Liberal/Conservative Attitude Toward Educational Issues," a paper presented at the Annual Meeting of the American Educational Research Association, April 1977, New York.

3. Scott, H. Brice, "Standards of Judicial Review Under the Equal Protection and Due Process Clause," Southern California Law Review, Volume 50, No. 4, May 1977: 689; John E. Nowak, "The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the 11th and 14th Amendments," Columbia Law Review, Volume 75, No. 8, December 1975: 1413; Notes, "Intention as a Requirement for De Jure School Segregation," Ohio State Law Journal, Volume 37, No. 3, 1976: 653; and Comments, "Restriction of Access to Federal Courts: The Growing Role of Equity, Comity, and Federalism," Temple Law Journal, Volume 50, No. 2, 1977:320.

4. Harold W. Chase and Craig R. Ducat, 1976 Supplement to Edward S. Corwin's The Constitution and What It Means Today, Princeton University Press, 1977: School Desegregation in Metropolitan Areas: Choices and Prospects," The National Institute of Education, October 1977. This is an edited text with several authors expressing their views.

5. New York Times, December 2, 1977: Buffalo Evening News, February 16, 1977.

6. Black Enterprise, Volume 8, No. 8, March 1978; Civil Rights Digest, Volume 9, No. 4, Summer 1977.

conservatives.[7] However, on most important issues involving civil rights and human rights issues the Nixon-appointed conservatives can always count on at least two moderate Justices to join them.

How strong is the conservative trend by the Burger Court? John Bannon,[8] an attorney with the Civil Rights Division of HEW and writing for it, feels that the Court is conservative and states that:

> The Supreme Court...in its recent school desegregation decisions, has firmly embedded in our jurisprudence the misleading distinction between de jure and de facto segregation. De jure segregation is imposed by law; de facto segregation is assumed to occur because of neutral factors such as residence. It seems that, for the foreseeable future, the de jure-de facto distinction will be used to allow and legitimize segregation in the nation's schools. The Court's decisions in the Detroit, Pasadena, and Austin school desegregation cases make this clear. These...cases have strengthened the de jure-de facto distinction in two ways: first, by limiting the scope of the remedy..., and second, by refusing to allow intent to segregate to be inferred from racially disproportionate impact or effect.

Derrick A. Bell, Jr. writing on the subject of school desegregation litigation for the Yale Law Journal states flatly that a lack of vigorous support by the Courts along with other changing conditions has just about ended public desegregation.[9] This view of the Court is also shared by Nathaniel

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7. Robert C. Maynard, "Blacks and the Burger Court: The Case of the Narrowing Path to Justice," Black Enterprise, Volume 8, No. 9, March 1978.

8. John Bannon, "Legitimizing Segregation, The Supreme Court's Recent School Desegregation Decision," Civil Rights Digest, Volume 9, No. 4, Summer 1977.

9. "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," Yale Law Journal, Volume 85, 1975-76: 470.

R. Jones, General Counsel for the NAACP.[10] Jones agrees with Justice Thurgood Marshall's dissenting opinion in Millikan v. Bradley (418 U.S. 717, 1974), the Detroit school desegregation case. Marshall stated that:

> Today's holding, I fear, is more a reflection of perceived public mood that we have gone far enough in enforcing the Constitution's guarantees of equal justice than it is the product of neutral principles of law.

Jones saw in Millikan v. Bradley the culmination of a national anti-black movement and labelled the decision as the "Detroit Dred Scott" decision.[12] U.S. Court of Appeals Judge J. Skelly Wright felt that the Court's decision in Millikan would result in a 'national trend toward residential, political, and economic apartheid (has) not only (been) greatly accelerated; it has been rendered legitimate and virtually irreversible, by force of law."[13] The late Justice William O. Douglas saw the Millikan decision as putting "the problem of blacks and our society back to the period that antedated the separate-but-equal regime of Plessy v.. Ferguson."[14] The feelings of these individuals can be summarized in historical and political terms. The second reconstruction era, 1954-1974, has ended. The first reconstruction era, 1870-1890, also lasted twenty years. As with the first reconstruction period we had the "Compromise of 1890" which culminated with a Supreme Court decision of 1896 (Plessy v. Ferguson[15]) which retarded racial progress with its "separate but equal" doctrine. Today, in the Detroit school desegregation decision in 1974 we see

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10. Nathaniel R. Jones, "Metropolitan Desegregation: Where Are the Courts Heading?." School Desegregation In Metropolitan Areas: Choices and Prospects, National Institute of Education, March, 1977.

11. Ibid, p. 66.

12. Ibid, p. 66.

13. Ibid, p. 63.

14. Ibid, p. 63.

15. 163 U.S. 537 (1896).

the culmination of the "Compromise of 1970", a retreat from aggressive state action to eliminate the negative effects of past and present racial discrimination.[16]

What did Justices Marshall and Douglas see in Millikan that escaped the general public? What did Circuit Judge J. Skelley Wright see? What did Nathaniel R. Jones of the NAACP see and the others concerned about racial equality in this country? The Supreme Court in Millikan changed several rules established by the Warren Court that would make it almost impossible for plantiffs to seek redress through the federal courts. First, it changed the rules for presenting evidence in cases involving historical racism. While it had been a practice in such cases to place the burden of proof for non-discriminatory acts on school boards and state governments, the Court applied that principle to the City of Detroit but with suburban school districts the burden was shifted to the plaintiffs. And as history would have it, whoever has the responsibility for the burden of proof, loses. Thus, in reality a metropolitan remedy would be impossible because plaintiffs could never satisfy the Court's standards of proof; and when the Court added another burden for plaintiffs in 1976, not only must plaintiffs prove that extensive racial segregation esists but they must prove intent.[17] Second, the Court in Millikan held that for the purpose of law, education was a local function not a state function. Thus, it was not possible to seek relief from the state. Third, seemingly neutral residential policies that restrict blacks to ghettos would continue and so would segregated schools. Fourth, what Associate Justices Marshall and Douglas saw along with Circuit Judge J. Skelly Wright and Nathaniel R. Jones of the NAACP was that decisions of the Supreme Court are more closely related to the collective social and political values of

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16. Millikan v. Bradley, 418 U.S. 717 (1974).

17. Worthington v. Davis, 96 S. Ct. 2040, 2054 (1976); U.S. LW 4789 (1976).

the Justices rather than objective "facts," and that the conservative Court that former President Richard Milhous Nixon sought had been consummated. For example, in the Bakke case which is currently before the Court, which claims that a white medical student was discriminated against in admission to the school, which is true. But the 14th Amendment permits such discrimination if there is a "compelling state interest;" and the Court's decision in this case will depend more upon the Justices' collective value system, rather than an objective evaluation as whether or not a "compelling state interest" existed that required some racial discrimination in medical school admissions. And whether or not such discrimination places a stigma of inferiority on the white race is also a value judgment.

Today we do not have to guess about the true mood of the Burger Court. The true mood of this Court is documented by the Court itself. In an arrogant opinion of the Court written by William H. Rehquist in Board of Curators of the University of Missouri v. Charlotte Horowitz[18] in which a medical student who was dropped from the school a week short of graduation asked the school to give her a hearing, gives us a good example of the Court's mood. The student in this case, Charlotte Horowitz, filed a suit under the Civil Rights Act of 1871 (known formerly as the Klu Klux Klan Act and currently as 42 U.S. C. section 1983) asking that the university give her a hearing. Section 1983 states that you must be given a dismissal hearing if you have a property or liberty interest involved. The plaintiff claimed a liberty interest on the grounds that being dismissed would make it difficult for her to get future employment in the health field or get admitted to another medical school. The plaintiff cited prior Court rulings in these matters to back up her claim for a formal hearing.[19]

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18. 538 F. 2d 1317 (1976); 542 F. 2d 1335; 430 U.S. 964 (1977).

19. Perry V. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Bishop v. Wood, 426 U.S. 341; Goss v. Lopez, 419 U.S. 565 (1975).

The Burger Court held that prior decisions in this area, including such cases as Sinderman, Roth, Biship, and Goss had been misinterpreted. Further, that Ms. Horowitz had no liberty interest at stake; and even if she had the university had already met their requirement of due process under the 14th Amendment, the informal feedback given the plaintiff about her progress; and, in fact, the university went beyond what the Court would have required. The Court went to great lengths to give a more conservative interpretation of its earlier decisions in this area. While the Court separated academic dismissal from disciplinary dismissal, it went on to say that even here, its decision in Goss meant only that students must be given an informal hearing with school officals, no formal hearing was intended. The Court used a litany of cases, mainly state cases, dating back to 1913 to justify its decision on historical grounds. What is the message here? The Burger Court is using opinions of current cases to reinterpret earlier Court cases in a more conservative manner; and thereby, saying to the legal profession do not rely strictly upon earlier Court cases in preparing your briefs; check out our latest interpretation of the issues involved. The arrogant tone in which the opinion was written indicates more strongly what Justices Marshall and Douglas came to realize in 1974, that the "Nixon Court" had arrived.

From this point, I will discuss in more detail the basic changes made by the Court that may have doomed further integration of public schools: (1) standing to sue; (2) opportunities to bring class action suits; (3) what test of evidence will be used, the rational or strict scrutiny test; (4) de jure/ de facto distinction and intent to segregate; (5) limitation on remedies for desegregation; and (6) the legal process for integration, attorneys' fees and rights. The Society of American Law Teachers' survey of the Supreme Court list these areas as the ones where the most radical changes have occurred.[20]

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20. "The Burger Court's Efforts to Close the Federal Courthouse to Public Interest Legislation," A statement of the Board of Governors Society of American Law Teachers, New York, October 10, 1976.

Standing to Sue

The Court has stiffened its requirements of standing before the Court. Unlike the Warren Court, plaintiffs now must demonstrate the article III requirement of "injury in fact." Further, the Court has narrowed its interpretation of rules limiting the assertion of another individual's rights; and has demanded proof from plaintiffs that the laws they were relying upon were designed to protect them.[21] The Court has made it more difficult for plaintiffs to bring suits against discrimination in federal courts.

The Court's reluctance to find "injury in fact" and grant plaintiffs standing to sue may be shown by three recent cases, Warth v. Seldin,[22] Simon v. Eastern Kentucky Welfare Rights Organization,[23] and Spangler v. Pasadena City Board of Education[24]. In Warth, low to moderate income minority group members who lived in Rochester, New York but worked in the suburb of Penfield charged Penfield's exclusionary single-family and low density zoning ordinances as discriminatory. The Court denied them standing, because they could not demonstrate "injury in fact." The Court indicated that its standing requirement could have been satisfied only if a developer of a moderate income housing project had applied for permission to build and had been refused. The trial never took place. In Simon the Court denied standing to low income individuals who challenged an Internal Revenue Service ruling, eliminating a requirement that non-profit hospitals serve low income patients to the extent of their financial ability, which they claim violated the Internal Revene Code, and encouraged hospitals to deny services to low income patients. The Court failed to see "injury in fact" because plaintiffs could not prove that a change in I.R.S. rules

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21. Society of American Law Teachers, op. cit.
22. 422 U.S. 490 (1975).
23. 96 S. Ct. 1917 (1975).
24. 553 F. 2d 992 (5th Cir., 1977).

would result in increased services to low income patients. The Court reasoned that the hospitals could choose to give up their favorable tax treatment rather than provide increased services to low income patients. In Spangler, a school desegregation case involving the Pasadena public schools, parents opposed to Pasadena's desegregation order were not allowed to formally intervene in the case because they were not a part of the original suit and therefore they lacked standing. In comparison, a California Court allowed a group of parents opposed to school integration in the Los Angeles City Schools to intervene rather late in the case.[25]

Also, in Warth taxpayers of Rochester were denied standing to bring a suit aginst suburban Penfield for individuals who were unable to find housing in Penfield. Middle and upper income individuals could not assert the rights of low income individuals. But, in Singleton v. Wulff,[26] the Court granted standing to doctors to challenge a state law denying medicaid benefits to patients who underwent certain abortions. Doctors were allowed to sue on behalf of their patients or assert the rights of others.

In the area of controversy, the Court has narrowed the definition. In Rizzo v. Goode,[27] a case involving claims of continued mistreatment of minority group members by the Philadelphia police department, the Court expressed serious doubts that the case met article III requirement of controversy. It is expected that similar cases brought before the Court in the future will be denied standing; that is, they will not be heard. The Burger Court has noticeably restricted the rights of plaintiffs to use the federal courts to correct abuses by state officials, especially those filing under section 1983

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25. Bustop v. Superior Court of the State of California for the County of Los Angeles, 137 Cal. Rptr. 793 (Cal. App. 1977).

26. 96 S. Ct. 2871 (1976).

27. 96 S. Ct. 598 (1976).

of the Civil Rights Act of 1871 by expanding the equitable restraint doctrine which states that a federal court will not ordinarily enjoin a pending state proceeding (Huffman v. Pursue, Ltd., 420 U.S. 592, 1975).[28] That doctrine had been weakened by the Warren Court in Dombrowski v. Pfister (380 U.S. 479, 1975) which involved a Louisianna subversive law used to harass blacks.

Closely related to standing to sue is the concept of mootness. In the De Funis[29] case in which a white student challenged the University of Washington's Law School admission policy, the Court ruled the case was moot because it was not a class action suit and the plaintiff had graduated (which was what he asked for). De Funis only asked that he be admitted. In Jacobs v. Board of School Commissioners of Indianapolis,[30] a case involving students who sought to get their newspaper published was ruled moot because the students had graduated. In school desegregation cases, however, the Court to date has refused to declare them moot because original plaintiffs had graduated.[31]

On a related matter, the exhaustion of state non-judicial remedies before plaintiffs in school desegregation cases can sue are generally not required.[32] Such a requirement would delay school integration cases for years.

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28. See: "Restrictions of Access to Federal Courts: The Growing Role of Equity, Comity, and Federalism," Temple Law Journal, Volume 50, No. 2, 1977: 320; and "Our Federalism - The Limitation of Younger-Samuels and Their Progeny on Federal Intervention in State Court Proceedings," Missouri Law Review, Volume 42, No. 4, 1977: 559.

29. De Funis v. Odegaard, 416 U.S. 312 (1974).

30. 420 U.S. 128 (1975).

31. For additional readings on standing to sue see: Albert, "Standing to Challenge Administrative Action An Inadequate Surrogate for Claim for Relief," 83 Yale Law Journal, 425, 1974; Scott, "Standing in the Supreme Court, A Functional Analysis," 86 Harvard Law Review, 645, 1973; Stewart, "The Reformation of American Administrative Law," 88 Harvard Law Review, 1723-47, 1975; and Note, "Standing to Raise Constitutional Jus Tertii, 88 Harvard Law Review, 423, 1974.

32. Bator, Paul M., et al., Hart and Wechsler's The Federal Courts and the Federal System, 1977 Supplement, Mineola, N.Y.: The Foudation Press, Inc. 1977, p. 158-159; also see comments in Comment, "Exhaustion of State Administration Remedies in Section 1983 Cases, 41, Univ. of Chicago L. R. 537, 1974.

Standing to Sue via Class Action

Class action is a special form of standing to sue. In most school integration cases, class action status is a must. Class action suits were developed in order to serve many individuals with similar claims. Although the Burger Court still grants class action suits, it has narrowed rules for granting class action status. The four conditions for granting class action status are (that): 1. the class must be so numerous that joinders of all members is impractical; 2. the question of law must be common to all members of the class; 3. the claims of the parties must be typical of the entire class; 3. the representative parties of the class must be able to adequately protect the interest of the class; 5. class action must be superior to other methods; and 6. in non-civil rights class action suits, each member of the class, individually, must show a potential loss of at least $10,000.[33] The Civil Rights Act of 1871 (42 U.S.C., 1983) does not require proof of loss in any amount, but it does require individual notice to all members of the class.

Class action rules which require notices to all members of the class, and that representative parties must be able to protect the interest of the class, are very important for plaintiffs who are poor. A few class action suits have been denied standing because plaintiffs were considered too poor to sustain a lengthy and costly law suit. This could make it difficult for poor people to bring suits against local school systems. The Court has also restricted the payment of attorney fees in class action suits making it difficult for poor plantiffs to secure legal assistance.[34]

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33. Rule 23(a), Federal Rules of Civil Procedure as Amended in 1966. Also see: Nolte, M. Chester, "Standing to Sue: A Fresh Look at Class Actions" in Current Legal Issues in Education by M. A. McGhehey, National Organization on Legal Problems of Education, 1977. Also see "Developments-Class Action," Harvard Law Review, Volume 89, No. 7, May 1976: 1319.

34. Society of American Law Teachers, op. cit.; "Title VII, Civil Rights Act of 1964: Standards for Award of Attorney's Fees to Prevailing Defendants," Wisconsin Law Review, Volume 1976: 207.

Judicial Test for Evidence

To this point, I have been discussing techniques in getting the Court to hear your case; now rules for the trial must be established. The Court generally will employ either the: 1. traditional test where the burden of proof is on those challenging a state policy; 2. or the strict scrutiny test where the burden of proof is on the state. The strict scrutiny test is employed when the Court has decided that the State must showa "compelling interest'in the continuation of a policy or when a "suspect" classification such as race is involved. Therefore, the big battle is over what test will be applied. If the strict scrutiny test is applied the state will nearly always lose; and if the traditional test is applied the plaintiffs will nearly always lose.

The importance of the judicial test applied in a case is clearly stated by Justice Marshall in a suit challenging the mandatory retirement age for Massachusetts state policemen.[35] The Court in this case reaffirmed its requirement stated in Rodriguez,[36] that there is strict scrutiny of a legislative classification only when the classification interferes with the exercise of a "fundamental" right or operates to the disadvantage of a particular "suspect" class. Justice Marshall in his dissenting opinion cited several cases suggesting application of the strict scrutiny test and noted that although the Court outwardly adheres to the notions of "fundamental" rights and "suspect" classes, it has apparently lost interest in their continued recognition.

Six other cases illustrate Justice Marshall's opinion about the application of strict scrutiny test of evidence by the Burger Court. In Mathews v. Lucas,[37] the Court denied the "suspect" classification to illegitimate children. Plaintiffs challenging school board reapportionment in Louisiana were denied the

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35. Murgia v. Mass. Board of Retirement, 427 U.S., 96 S. Ct. 2562, L. Ed. 2d (1976).

36. Rodriguez v. San Antonio Independent School District, 4111 U.S. 1 (1973).

37. U.S. 427 (1976).

strict scrutiny test on both "fundamental" rights and the "suspect" classification.[38] Plaintiffs in Mississippi were denied the strict scrutiny test involving a district hiring policy brought by the Justice Department.[39] While in school integration cases in Detroit[40] and Buffalo[41], the strict scrutiny test was granted to challenge within district segregation, but the traditional test was granted to challenge metropolitan segregation involving their suburbs.

Departure of the Supreme Court from its tradition of granting plaintiffs in school integration cases the strict scrutiny test came about when the issue was no longer de jure segregation, segregation by law; but de facto segregation due mainly to segregated housing patterns. In the Denver[42] school integration case, plaintiffs were denied the strict scrutiny test, but the Court did require a remedy for the de facto segregated Denver public schools. In a related case involving Texas' method of financing public schools, the Court shocked the educational community when it declared that education was not a "fundamental" right, nor would the Court consider low income students a "suspect" classification.[43] The "fundamental" interest concept is in essence the Ninth Amendment to The U.S. Constitution, which states that rights enjoyed by the people but not listed in the Constituion cannot be taken away. However, it is up to the Court to decide what rights not listed in the U.S. Constitution are fundamental. In the Texas school finance case, the Court decided that education was not a "fundamental" right. This is a very narrow interpretation of the Ninth Amendment.

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38. Panoir v. Iberville Parish School Board, 536 F. 2d 101 (5th Cir., 1976).

39. U.S. v. Corinth Mun. Separate School District, 414 F. Supp. 1336 (N.D. Miss. 1976).

40. Milliken v. Bradley, 411 F. Supp. 937 (E.D. Mich. 1975).

41. Arthur v. Nyquist, 415 F. Supp. 904 (W.D. NY 1976).

42. Keyes v. School District No. I, Denver, Colo., 413 U.S. 189 (1973).

43. Rodriguez v. San Antonio Independent School District, 41 U.S. 1 (1973).

The Warren Court had expanded the strict scrutiny principle by adding to "suspect" classification the concept of "fundamental" interest. Therefore, application of either "suspect" or "fundamental" interest could lead to strict scrutiny of the evidence. Generally, fundamental interest issues involved race, voting,[44] interstate travel[45], and appeals in criminal cases.[46] However, the Burger Court in Rodriquez [47] refused to grant fundamental interest status to education. The exception is sex. The Burger Court granted this status to sex in Craig,[48] but this may be considered dictum, a case ruled on because the situation was so outrageous rather than a sign of change of direction by the Court. In Craig, an Oklahoma law allowed 18 year old females to buy beer, but males had to be 21 years old in order to buy beer. The state argued that the law was necessary to maintain traffic safety since more males were involved in traffic accidents than females. The Court invalidated the law.

De Jure/De Facto/Intent

Since Keyes, the 1973 Denver school integration case, the Court made a clear distinction between de jure segregation by law and de facto segregation due mainly to housing patterns. The Burger Court differs significantly from Brown, the 1954 school desegregation case, in that harmful effects of segregated schooling are not considered in rendering its decision; the only important item for the Burger Court is whether or not segregation was due to official state action.[49] The Burger Court is only concerned with "intended" or de jure

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44. Harper v. Virginia Board of Elections, 383, U.S. 663, 1966.

45. Shapiro v. Thompson, 394 U.S. 618, 1969. (residency requirement for welfare).

46. Douglas v. California, 372 U.S. 353 (1963).

47. 411 U.S. 1, 1973.

48. Craig v. Boren, 975 Ct. 451, 1976.

49. "Reading the Mind of the School Board: Segregative Intent of the De Facto/Dr Jure Distinction," Yale Law Journal, Volume 86, 1976:292.

segregation. School boards action must have reasonably foreseen the consequences of their action as evident in Diaz v. San Jose,[50] Husbands v. Pennsylvania,[51] and Hart v. Community School Board of Education.[52] However, there is difficulty in defining intent. Justice Steven admitted as much in Washington v. Davis, that defining the collective will of a group will be difficult. There are evidentiary problems; judges must rely upon their knowledge of human nature in making decisions about intent. Descisions by trial judges are difficult to review by appelate courts because much depends upon the credibility of statements made by school officials at a particular time.

In Austin Independent School District v. United States[53] the Court summarily vacated the 5th Circuit judgment that relied upon the foreseeable test and remanded the case back to the 5th Circuit of Appeals in light of Washington v. Davis which used intented purpose test. In Oliver v. Michigan Board of Education[54] the 6th Circuit defined "intent" by looking at school board policies that lead to legitimate educational objectives rather than at board statements of motives. In U.S. v. Omaha School District[55] the district court dismissed, ruling that plaintiffs had failed to carry their burden of producing evidence from which segregative intent could be inferred. On appeal, the 8th Circuit Court of Appeals reversed, stating that a presumption of segregative intent arises once a plantiff establishes that school authorities engaged in acts of omissions or actions; and foresaw the consequences of their actions or inactions. In the Omaha case a big factor that led to segregative intent was

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50. 412 F. Supp. 310, 329, N.D. Cal. (1976).

51. 395 F. Supp. 1107, 1132 E.D. P2 (1975).

52. 512 F. 2d, 50, 2nd Cir (1975).

53. 45 USLW, 3413, U.S. Dec. 6, 1976.

54. 508 F. 2d 178 6th Cir (1974), Cert. denied, 421 U.S. 963 (1975).

55. 389 F. Supp. 293, D. Neb. (1974); 521 F. 2d 530, 536 (8th Cir), 423 U.S. 946 (1975). Also see: "Intent to Segregate: The Omaha Presumption," George Washington Law Review, Volume 44: 775, August 1976.

faculty segregation. The Court held that faculty assignment was one in which the board had complete control over and could have integrated.

In Craig v. Boren,[56] the 1976 Oklahoma case involving sex discrimination in the rights to buy beer the Court gave us its definition of segregative intent. The Supreme Court stated that school board actions or inactions must be rationally related to goal achievement. Rather than asking whether the classification is necessary to promote a government interest, the new standard asks whether it is substantially related to promoting that interest. The new standard asks whether government objectives are important and compelling. Thus, being important may not be compelling. However, the U.S. 2nd Circuit Court of Appeals in a March 1978 decision involving the Buffalo integration case of which I am a consultant for the plaintiffs use the "foreseeable consequence" test of intent instead of the new "substantically related" test issued by the Supreme Court in Craig; and in keeping with Millikan the 2nd Circuit dismissed the state as a defendant in the case.

In Keyes, the concept of intent was born, but the Court did not define intent. In Hart the Court used an objective tort standard of reasonably foreseeable consequences of action test to define intent. In contrast, in Husbands, the Court held that intent meant subjective motives by school boards to segregate. This definition would make it difficult for plaintiffs to meet with respect to the quality and quantity of evidence necessary to sustain their burden of proof.[57] And in Craig we have the substantially related test by Supreme Court.

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56. 97 S Ct. 451, 1976.

57. "Intention as a Requirement for De Jure School Segregation," Ohio State Law Review Journal, Volume 37, No. 3, 1976: 653; "Constitutional Law-Disparate Impact of Legitimate State Stature on School District Does No Violate Constitutional Rights Absent Showing of State Supported De Facto Segregation...," Temple Law Journal, Volume 50, No. 2, 1977: 372.

The courts generally look at school board policies in five areas for segregative intent: faculty assignments; faculty and student transfer policies; conversion of feeder schools; school site selection; and changing attendance zones. But, there is evidence that government may pursue segregative goals in more subtle ways, by drafting legislation which appears race-neutral, but nevertheless has a disproportionately negative impact on racial minorities; and by administering otherwise race-neutral laws so as to disadvantage racial minorities.[58] (Jefferson v. Hackney, 406, 535, 1972 - differential impact; Yick Wo v. Hopkins, 118 U.S. 356, 1886 - discriminatory administration) A classic case of government's ability to use race-neutral laws to achieve segregative intent is seen in Yick Wo, an 1886 case in which the City of San Francisco wanted to get rid of Chinese laundries and, knowing that most were made of wood, passed a law banning all laundries made of wood. The Court invalidated the law. Clearly, the concept of intent or motive to segregate is a radical departure from the Warren Court, for as late as 1971 in Palmer v. Thompson[59] the Court rejected intent and ruled on disproportional impact.

Remedies

Requirements by the Burger Court of school districts to correct for racially segregated schools once found guilty of such practices is perhaps the Court's weakest linkage in the school integration process. In many instances, the Court has allowed school officials to fashion their own school integration plans.[60] Generally, remedies selected by local boards have resulted in continued

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58. John Leubsdorf, "Completing the Desegregation Remedy," Boston University Law Review, Volume 57, No. 1, January 1977: 39.

59. 403 U.S. 217, 1971.

60. USA v. Hale County Board of Education, 423 F. Supp. 275 (D.C. Ala., 1977); Dawson v. Troxel, 561 F. 2d 694 (Washington App. 1977); Stout v. Jefferson County Board of Education, 537 F. 2d 800 (5th Cir., 1976); and Arthur v. Nyquist (Buffalo, N.Y.) 415 F. Supp. 904 (W.D. NY 1976).

segregation of the schools. Illustrative of this point is the remedy approved for the Buffalo, New York public schools.[61] The Buffalo plan called for a series of "magnet schools" which resulted mainly in white students remaining in their neighborhood schools and black students being bussed out of their neighborhoods. A similar situation exists in Detroit and the Houston public schools.

With several cases, as stated earlier, the Court has recommended no remedies for de facto segregated school districts, if no intent to segregate by school officials was found. Generally, metropolitan remedies have not been approved; and in an unexpected decision the Court in the Pasadena, California case made it possible for school districts once integrated, and later segregated because of shifts in population, to remain segregated.[62]

The retreat by the Burger Court on school desegregation remedies is amply illustrated in a March 1978 decision by the 2nd Circuit Court of Appeals in the Buffalo case. The Buffalo desegration case on appeal from the district court by the school district upheld the district court's ruling that officials in Buffalo were guilty of segregative intent, but gave specific advice on remedies. Citing Supreme Court decisions on school desegregation remedies in Omaha and Dayton the 2nd Circuit Court of Appeals stated that:

> The Supreme Court has made it clear in its recent opinions that not only must a remedy be appropriate to an infraction, but also that it can reach no further than the incremental harm caused by the infraction itself. If such violations are found, the district court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effort these violations had on the racial distribution of the school population as presently constituted, when compared to what it would have been in the absence of such...violations. The remedy must be designed to redress that difference and only if there has been a systemwide impact may there be a systemwide remedy.

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61. Arthur v. Nyquist, 415 F. Supp. 904 (W.D. NY 1976).

62. Spangler v. Pasadena City Board of Education, 44 USLW 5114 (June 28, 1976).

The Court also ordered the district court to take into consideration the motives of present Buffalo School Board members in formulating a remedy. This places the district court in a difficult position of determining how much segregation was due to many years of cumulative acts by the Board and to defend its decision before the Court of Appeals; and remedy suggested by the district court will almost certainly be appealed by the school board. This situation would tend to lead to conservative recommendations of a remedy by district court judges. Given this situation, and drawing upon my experience in the Buffalo case (and in conversation with individuals involved in other school integration cases) school districts are just dragging out that phase of court proceedings designed to determine guilt and concentrating their efforts on narrowing the scope of a court-ordered remedy, the second phase. In fact, that is the stated strategy of the school board lawyers in the Buffalo case. The case is now in its sixth year and a final remedy is nowhere in sight; and if and when it comes it will probably be a very limited one. In practice, the courts have ruled that in de facto segregated communities, the degree of de jure segregated schooling in that community must be limited to approximate residential segregation. Thus, we have a return of the neighborhood school concept, without the right of school boards to change zoning patterns to shift pockets of whites from a black school to a nearby white school. Further, once integrated and resegregated due to shifting residential patterns the courts have barred further integration remedies. And for those that are desegregated for eight years or more to use extensive tracking of pupils that results in all black classes.[63]

Attorney's Fees, Lawyer-Client Relations, and Judges

In addition to the Burger Court changing interpretations of the Constitution, the Court has placed restrictions on the ability of plaintiffs to obtain legal counsel; despite the right of individuals to bring action against

63. McNeal v. Tate School District, (Miss.), 508 F. 2d 1017 US App., 5th Cir.(1975).

the state.[64] First, the lawyer-client relationship in most civil rights cases is considered unethical by most states and may lead to a loss of an attorney's license to practice law.[65] The Warren Court in the 1950s approved of this special lawyer-client relationship by the NAACP in a Virginia case involving civil rights.[66] In most civil rights cases, the lawyer usually seeks out plaintiffs to participate in a class action suit and thereafter, plaintiffs are rarely involved in court proceedings or in its outcomes. That situation is changing; states sensing the conservative trend of the Supreme Court are beginning to apply the standard lawyer-client relation rules to civil rights cases. In South Carolina, for example, in 1973 an American Civil Liberties Union attorney attended a meeting with women ordered to submit to forced sterilization to advise them of their rights. The South Carolina Bar charged that the ACLU lawyer had violated legal ethics by soliciting business; and the state Attorney General argued before the U.S. Supreme Court (1977) that the ACLU attorney urged women who had been sterilized to file suit against the doctors and the state.[67] If the Court rules in favor of South Carolina, there will be fewer lawyers willing to get involved in civil rights cases. Second, with attorney's fees Title VII (and Title II) of the Civil Rights Act of 1964 provides for reasonable fees to be awarded to the winning party.[68] School board lawyers supported by

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64. John E. Nowak, "The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the 11th and 14th Amendments," Columbia Law Review, Volume 75, No. 8, December, 1975: 1413.

65. DerrickA. Bell, Jr., op. cit.

66. Ibid.

67. Black Enterprise, Volume 8, No. 8, March 1978, p. 12.

68. "Title VII, Civil Rights Act of 1964: Standards for Award of Attorney's Fees to Prevailing Defendants," Wisconsin Law Review, Volume 1976: 207.

tax dollars may drag out court proceedings with delaying tactics and will be paid regardless of the outcome of the case; while plaintiffs' lawyers must win their case in order to be adequately reimbursed for their services. However, the level of reimbursement is changing. In Keyes, the amount awarded plaintiffs' lawyers was reduced by 50 percent by the Circuit Court, with the explanation that attorneys involved in public service usually do so for half their usual fee; and well-paid school board attorneys usually spent a lot of time in court arguing against requested attorney's fees for plaintiffs.

The other areas that might tend to make integration remedies more difficult involves the political nature of upward mobility by district court judges who must try these cases and supervise their implementation. In writing opinions in desegregation cases, it is in the judge's best interest to be conservative and not have his decision reversed. To have too many decisions reversed is an indication that one is not ready for a higher level judgeship. And in most states, recommendations for judgeships are performed by political parties; and to become known as a "forced busing" judge is not the best way to be promoted or even retained in one's current position.

Summary

The school integration movement is over. The second reconstruction, 1954-1974, is over with the "Compromise of 1970" that was legitimatized in 1974 with Millikan, the Detroit desegregation case. The current fate of school integration is succinctly put in a March 1978 issue of the New York Times:[69]

> The Supreme Court has issued rulings over the last year that delayed busing plans in half a dozen cities. Congress has passed an amendment that virtually halted attempts by the Federal Government to desegregate schools through executive action. The Court and Congress seem to be reflecting a national mood that opposes aggressive attempts by racial minorities to gain a larger share of the political and economic pie.

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69. New York Times, March 13, 1978, p.1

Justices Marshall and Douglass; and Jones of the NAACP saw this mood in 1974. What then are our options, if further Court-ordered school integration has ended? I suggest three strategies to be employed concurrently: one judicial, one political, and one legislative. In the courts, I suggest that we follow the lead suggested in Keyes, the Denver school integration case. In Keyes, the Court ordered the defacto segregated Denver school system to meet standards laid down by Plessy in 1896. That is, in all other areas of education make ghetto schools equal in every way to non-ghetto schools. This, in my opinion, may be more difficult for school districts to accomplish than integration. In fact, many school districts if given a choice may opt for integration rather than meet the standards of Plessy. Politically, I suggest that we attempt to do what former President Franklin D. Roosevelt attempted to do in the 1930s and what former President Richard M. Nixon did in the 1960s. Change the complexion of the Supreme Court with new appointees.[70] Legislatively, I suggest that Congress pass legislation aimed at making ghetto schools more productive. This legislation would complement current compensatory education programs. I recommend that the federal government create a new program to award schools for increased productivity: productivity is defined as the percentage increase of students enrolled in the upper levels of college (juniors and seniors) over the district's last five year average. To get this increase it would force districts (teachers) to eliminate ability groupings and concentrate on teaching literacy skills in the verbal domain. I suggest that these federal incentive grants be attached on to school district personnel salaries as a bonus in direct relation to the percentage of disadvantaged students in their schools. Another distribution formula will have to be worked out for central office personnel. This program will serve primarily

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70. John Coons, a Professor of Law at the University of California at Berkeley with extensive writings and involvement in school integration cases, stated in an address at the Annual Conference of the National Organization for Legal Problems in Education, that all things being equal, whether you won your case, depended upon which judge you drew. 1977.

as an urban school fund, because it is unlikely that rich suburban schools will be able to increase the percentage of college-bound students from their schools. Urban schools will feel the major impact of this legislation. The war is over and we have lost, so let's regroup and come out fighting.